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**Federalism and Treaty Enforcement
in the European Union: Letters from
America**

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Federalism and Treaty Enforcement in the European Union: Letters from America

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Abstract

Drawing on a comparative analysis of the constitutional framework on treaty enforcement in the European Union and the United States this paper addresses two suggestions – two Letters from America – to the European Court of Justice (‘ECJ’), as the EU institution responsible for ensuring that in the interpretation and application of the EU Treaties the law is observed. First, the paper recommends that more emphasis be put on the constitutional dimension of the analysis of whether an EU agreement or a provision thereof is directly applicable. Second, it suggests that a rebuttable presumption in favour of direct applicability be introduced in the Court’s analysis. Embracing both suggestions would render more persuasive the ECJ’s approach to the issue of treaty enforcement as it would increase the predictability of the Court’s analysis and thus legal certainty, while at the same time carving out a meaningful space for considerations based on domestic constitutional principles, including those that aim to protect the delicate balance between unity and diversity that characterises the EU compound polity.

Introduction

As a federal-type constitutional order with international legal origins, the issue of treaty enforcement is not unfamiliar to legal discourse in the EU.¹ In a long line of case law ranging back to the seminal *Van Gend & Loos* ruling,² the European Court of Justice (ECJ) has developed a doctrine of direct applicability – referred to as one of direct effect – on the basis of which the ECJ has been able to ensure that EU law is applied effectively and uniformly in all EU Member States. Through purposive reasoning, the ECJ has cast the net wide, and has recognised the direct effectiveness of an ever wider-range of provisions of EU law, both of a constitutional and a legislative nature, leading one ECJ judge to refer to the issue of direct effect as an ‘infant disease’ of EU law.³

Starting in the 1970s, as the EU started engaging in foreign relations, including through the conclusion of treaties (EU agreements), a new type of direct effect or direct applicability question came before the Court. In addition to the direct effect of domestic EU law, the ECJ was asked to determine whether EU courts could apply EU agreements or provisions thereof directly, both against conflicting Member State law and against conflicting secondary EU law. As Mario Mendez has described, the ECJ effectively extended its approach grounded in purposive reasoning to the sphere of EU agreement-Member State law conflicts, in particular if the agreement was of a bilateral nature.⁴ With regard to conflicts between EU agreements and secondary EU law, however, the Court has taken a less liberal approach, at least from the vantage point of international law. How the difference in approach is to be explained, or how the ECJ approaches the direct applicability analysis more broadly considered, is not always clear.

This paper examines the ECJ’s approach to treaty enforcement from a comparative, transatlantic perspective.⁵ By exploring debate on the issue of the enforcement of treaty obligations within the United States, the paper identifies its lack of predictability as an important weakness of the ECJ’s approach. To remedy this shortcoming, it puts forward two suggestions – two Letters from America.⁶

¹ On the EU as a compound, federal-type polity, see e.g. Pernice, Ingolf “Multilevel Constitutionalism and the Crisis of Democracy in Europe”, (2015) 11 EuConst 541–562. On the process of constitutionalisation, see Stein, Eric, “Lawyers, Judges, and the Making of a Transnational Constitution”, (1981) 75 AJIL 1.

² Case C-26/62, *Van Gend & Loos*, EU:C:1963:1.

³ Pescatore, Pierre, “The Doctrine of “Direct Effect”: an Infant Disease of Community Law”, (1983) 8 EL Rev 155–177.

⁴ Mendez, Mario, *The Legal Effects of EU Agreements* (Oxford: Oxford University Publishing, 2013).

⁵ Interest in US constitutional law is long-standing amongst EU lawyers. See e.g. Cappelletti, Mauro, Seccombe, Monica and Weiler, Joseph, *Integration Through Law: Europe and the American Federal Experience* (Walter de Gruyter, 1985).

⁶ The phrase has been used before by Robert Schütze, in his “Federalism as Constitutional Pluralism: “Letter from America”, in Avbelj Matej & Komarek Jan, *Constitutional Pluralism in the European Union and Beyond* (London: Hart Publishing, 2012), 231–248. It harks back to the BBC radio programme ‘Letter from America.’ See <http://www.bbc.co.uk/programmes/b00f6hbp> (online on 19 September 2016>.

As will quickly become clear, the issue of treaty enforcement is as contentious in the United States as it is in the EU. Since the case of *Medellin v Texas*,⁷ American academic commentators have been engaged in debate both on what it means for a treaty to be ‘self-executing’ and how one is to determine the self-executing nature of a treaty provision. By failing to provide guidance, the *Medellin* Supreme Court arguably put lower federal courts in a similar predicament as the ECJ has put Member State courts charged with the responsibility of applying EU law.⁸ One thing *Medellin* has done, however, is trigger a rich discussion amongst academic commentators. It is out of this discussion that this paper extracts the abovementioned suggestions for the ECJ, the two Letters from America.

A first suggestion operates at the level of the normative justification of the ECJ’s approach to the question of treaty enforcement. It is recommended that the ECJ acknowledge more explicitly the constitutional nature of the issue of treaty enforcement and, in doing so, articulate more clearly the constitutional principles at play in the treaty enforcement analysis. In the US context, the Supremacy Clause and the sovereignty of Congress as the representative of the American citizenry play a role in the treaty enforcement analysis, depending on whether a conflict with State or federal law is at issue. In the EU, in particular since Opinion 2/13, in which the ECJ transposed the principle of autonomy from the EU-Member State to the EU-international law nexus, no equivalent normative underpinning for the ECJ’s approach to treaty enforcement has been articulated.⁹ For reasons of legal accountability and legitimacy, it is time for this gap to be filled.

A second suggestion operates at the legal-doctrinal level. It is recommended that the ECJ perform its direct applicability analysis on the basis of a rebuttable presumption in favour of direct applicability. Such a presumption would do justice to the EU’s commitment to a rule-based liberal international order, while at the same time granting the Court the necessary means to protect domestic constitutional principles, including the autonomy of the EU legal and institutional order. It would, moreover, increase the predictability of the ECJ’s direct applicability analysis, which in turn benefits legal certainty.

The paper is divided in three parts. The first part explores the *Medellin* decision by the US Supreme Court and the constitutional debate on the issue of self-execution to which this ruling has given rise. The second part explores the prevailing approach to treaty enforcement in the EU. In both parts, regard will be had for federalism’s two dimensions, i.e. unity and diversity.¹⁰ The first dimension pertains to the enforcement of treaties against conflicting member unit law (diversity); the second to the enforcement of treaties against

⁷ 552 US 491 (2008).

⁸ Art. 19 TEU.

⁹ See Opinion 2/13 (‘EU Accession to the ECHR’), EU:C:2014:2454.

¹⁰ In this sense, in the Canadian context, see *Reference re Secession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) [43] (‘Federalism was the political mechanism by which diversity could be reconciled with unity’).

conflicting federal law (unity). A third and final part further elaborates on the two above-mentioned suggestions.

I. Federalism and treaty enforcement in the United States

The issue of the enforcement of treaty obligations in the United States came before the US Supreme Court in the case of *Medellin*.¹¹ At issue in *Medellin* was the question of whether the Texan authorities were required to comply with a ruling by the International Court of Justice (ICJ). The ICJ had ruled that the United States had breached its obligations under the Vienna Convention on Consular Relations. It had breached, in particular, Article 36(1), which requires the parties to the Convention to ensure that nationals of parties to the convention are given the opportunity to benefit from consular assistance after being arrested and detained.

The Texan authorities had not given Mr Medellin this opportunity when he had been arrested for the alleged rape and murder of a young girl. When the ICJ issued its ruling, Texan courts had already convicted and sentenced Mr Medellin. In its ruling, the ICJ had ordered the United States to review the conviction and sentence of Mr Medellin and 50 other Mexican nationals in a similar situation.¹² Before the US courts, the question arose as to whether the ICJ ruling was binding within the United States. In particular, the issue triggered a federalism question, as the breach of the Vienna Convention had been caused by the State of Texas, whose law of criminal procedure precluded review of convictions and sentences in the specific circumstances at hand. Before the Supreme Court, Mr Medellin based his plea on the self-executing quality of Article 94(1) of the UN Charter, which provides that '[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.' In doing so, Mr Medellin aimed to persuade the Supreme Court to confirm the binding nature of the ICJ ruling on the Texas authorities, and thereby to coerce Texas into reviewing Mr Medellin's conviction and sentence.

The issue the *Medellin* Court was required to grapple with was two-fold. First, what does it mean for a treaty to be 'self-executing' and, second, how can one identify a 'self-executing' treaty provision? On both issues, the *Medellin* Court arguably did not perform well. On the first issue, Chief Justice Roberts gave conflicting signals, suggesting at one point that a 'non-self-executing' treaty provision merely cannot be enforced by US courts¹³,

¹¹ 552 US 491 (2008). Note that the discussion on self-execution predates the ruling. See e.g. Yoo, John C., "Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding", (1999) 99 Col L Rev 1955. In response to Yoo, see Vazquez, Carlos Manuel, "Laughing at Treaties", (1999) 99 Col L Rev 2154.

¹² In particular, at p 64, it had held that 'the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the: convictions and sentences of the Mexican nationals.'

¹³ On p 10 he held e.g. that '[b]ecause none of the [treaty sources relied upon by Mr Medellin] create binding federal law in the absence

and on another that such treaty provisions lack any binding force within the US.¹⁴ Furthermore, the Chief Justice appeared to deny the President's authority to enforce non-self-executing treaty provisions against State officials on the basis of his or her power to ensure that 'the laws be faithfully executed'¹⁵, thereby going against the text of the Supremacy Clause, which provides that treaties, like the Constitution and federal legislation, are to be understood as 'part of the supreme law of the land' of the United States.

On the second issue, the Chief Justice approached the question of whether Article 94(1) of the UN Charter is self-executing within the United States as an issue of treaty interpretation, which, as such, called primarily for an analysis of the treaty text.¹⁶ On the basis of the text and context of the concerned provision – the context being the emphasis the UN Charter puts on political rather than judicial means of conflict resolution – the Chief Justice considered Article 94(1) not to be self-executing within the United States.¹⁷ This implied that the Texan authorities could not be coerced, as a matter of US law, to review the conviction and sentence of Mr Medellin. Shortly after, Mr Medellin was executed.

The ruling in *Medellin* has been subject to strong criticism. In the ruling itself, Justice Breyer, in dissent, castigated the majority for 'look[ing] for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language).'¹⁸ In Justice Breyer's view, the majority's approach was misguided, since in most treaties – in particular multilateral conventions such as the UN Charter – the parties to the agreement did not have any intention as to how the Charter would be executed within the domestic legal orders of the parties to the treaty. To search for such an intent, he argued, is like the hunting of the snark.¹⁹ This should not come as a surprise, he considered, as a wide variety of approaches exists among the many parties to the Charter on the issue of how treaty obligations ought to be enforced. If the treaty framers would be required to reach a consensus on this issue, no agreement would be adopted at all. In Justice Breyer's own words:

[G]iven the differences among nations, why would drafters write treaty language stating that a provision about, say, alien property inheritance, is self-executing? How could those drafters achieve agreement when one signatory nation follows one tradition and a second follows another? Why would such a difference matter

of legislation, and because it is uncontested that no such legislation exists, we conclude that the [ICJ] judgment is not automatically binding domestic law.'

¹⁴ On p 15 e.g. he mentioned that 'the ICJ Statute, incorporated into the UN Charter, provides further evidence that the ICJ's judgment ... does not automatically constitute federal law *judicially enforceable* in the United States courts.' Similarly, in a footnote on p 9, he held: 'What we mean by "self-executing" is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a "non-self-executing" treaty does not by itself give rise to *domestically enforceable* federal law' (emphasis added).

¹⁵ Art. II § 3 US Constitution.

¹⁶ *Medellin*, 506.

¹⁷ *Ibid*, 507: 'The most natural reading of the Optional Protocol is as a bare grant of jurisdiction.'

¹⁸ *Ibid*, 526 (dissent, Breyer J).

¹⁹ *Ibid* 549 (dissent, Breyer J). The hunting of the snark refers to the nonsense poem by Lewis Carroll, in which a crew of ten unsuccessfully tries to hunt for a creature referred to as a 'snark.'

sufficiently for drafters to try to secure language that would prevent, for example, Britain's following treaty ratification with a further law while (perhaps unnecessarily) insisting that the United States apply a treaty provision without further domestic legislation? Above all, what does the absence of specific language about 'self-execution' prove? It may reflect the drafters' awareness of national differences. It may reflect the practical fact that drafters, favoring speedy, effective implementation, conclude they should best leave national legal practices alone. It may reflect the fact that achieving international agreement on this point is simply a game not worth the candle.²⁰

Justice Breyer pointed out that the question of how the UN Charter is to be enforced within the United States is, first and foremost, a question of US constitutional law. The key to answering this question, he continued, lies within the meaning of the Supremacy Clause. This clause of the US Constitution provides that '[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' By introducing the Supremacy Clause in the analysis, the question becomes: what role does the Supremacy Clause play in answering the question of how treaties are to be enforced within the United States?

Opinions diverge on this question. Justice Breyer called for a practical, context-specific multi-factor approach, according to which US courts ought to take into account not only the text of the treaty, but also the drafting history and considerations of policy, relating to the political impact the judicial enforcement of a treaty provision would have within the United States. Under this approach, courts would seek to 'separate run-of-the-mill judicial matters from other matters, sometimes more politically charged, sometimes more clearly the responsibility of other branches, sometimes lacking those attributes that would permit courts to act on their own without more ado.'²¹

Others – including the Chief Justice – have criticised the approach proposed by Justice Breyer for the lack of legal certainty it offers.²² Carlos Manuel Vázquez has proposed a different, arguably more promising approach.²³ Vázquez understands the concept of 'self-execution' in a narrow sense as referring to the need for a treaty to be implemented by means of legislation before it can be relied upon before the courts.²⁴ Vázquez

²⁰ Ibid, 548-549 (dissent, Breyer J).

²¹ Ibid, 550-551 (dissent, Breyer J).

²² Ibid, 515, describing the approach as 'arrestingly indeterminate.'

²³ See Vázquez, Carlos Manuel, "Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties", (2008) 122 Harv L Rev 599-695.

²⁴ On the concept of self-execution in the US, see already Vazquez, Carlos Manuel, "The Four Doctrines of Self-Executing Treaties" (1995) 89 AJIL 695.

acknowledges, as did Justice Breyer, that to determine whether a treaty provision requires further implementing legislation requires an analysis of the text of the treaty, as indicative of the intention of the parties to the treaty.

As Justice Breyer recognised also, in many if not most occasions, in particular in the context of multilateral treaties, no such intent is available. In such a situation, Vázquez argues, a default rule is required. For, absent such a rule, courts would enjoy an unacceptable degree of discretion in determining the impact of treaties within the domestic legal order. What type of default rule should US courts recognise? Vázquez argues that the Supremacy Clause, which considers treaties part of the supreme law of the land, calls for the recognition of a default rule in favour of self-execution.²⁵ In this view, the self-execution analysis should proceed on the basis of a presumption that treaties are self-executing and can thus be enforced directly by US courts, even in the absence of implementing legislation.

Such a presumption can be rebutted, Vázquez submits, by means of a clear statement that a treaty requires further legislative implementation. Ideally, such a statement would be part of the treaty, e.g. by means of the inclusion of a reservation to the treaty. Less ideally, but nonetheless acceptably, it could take the form of a declaration made by the United States brought to the attention of all parties to the treaty, by virtue of it being included in the instrument of ratification. Unilateral statements, e.g. by the President, on the occasion of the referral of a proposed treaty to the Senate, would not be considered a clear statement, in Vázquez's view.

The recognition of a default rule and a clear statement rule as proposed by Vázquez would facilitate the self-execution analysis US courts are required to perform whenever they are confronted with a plea based on a treaty obligation. It would bring uniformity to an area of law in which rulings of lower courts tend to point in different directions, thereby increasing legal certainty. The proposal fits well with the text of the Supremacy Clause, as well as with the rationale of that provision, as a means to remedy the pre-1789 United States' inability to ensure the proper enforcement of federal treaty obligations.²⁶

As the recent first draft of Treaties chapter of the Restatement (fourth) of the Foreign Relations Law of the United States indicates, the case law has not established a presumption for or against self-execution, in the sense of a clear statement or default rule that dictates a result in the absence of contrary evidence.²⁷ As for the political institutions, in particular the Senate, they increasingly adopt so-called 'declarations of non-self-execution.' The Senate makes conditional its consent to a treaty to the inclusion of such a declaration in the

²⁵ Vázquez, *supra* note 22 at 614.

²⁶ On this rationale, see *Id.* at 616–619.

²⁷ First draft of the Treaties chapter of the Restatement (fourth) of the Foreign Relations Law of the United States § 106, Reporters' Notes (3). Curtis Bradley did read a number of lower court rulings as being supportive of a presumption against self-execution. See his *International Law in the U.S. Legal System* 43–44 (2015).

ratification instrument. The courts, the Restatement submits, typically defer to such declarations.²⁸ This strategy of deference shifts the final say over the question of the self-executing nature of treaty provisions away from the courts, to the Senate. While contested on constitutional grounds by some commentators – in particular by the late Louis Henkin²⁹ – Vázquez nonetheless considers declarations of non-self-execution to pass the constitutionality test. As long as they are included in the instrument of ratification, he considers, they can be considered part of the ‘treaty’, in the meaning attributed to that term by the Supremacy Clause.³⁰

As this brief introduction to the American legal debate on the question of the enforcement of treaty obligations demonstrates, in the US, the issue of treaty enforcement is very much understood as a constitutional question. The Supremacy Clause plays a central role in this debate. Whether or not one recognises a default rule in favour of self-execution necessarily depends on one’s reading of the text of the Supremacy Clause, its context, as well as the reasons that led the founding fathers to include the provision in the 1789 Constitution. In *Medellin*, the US Supreme Court refused to endorse any form of presumption. It remains to be seen if the Court, on a next occasion, and in a different constellation after the death of Justice Scalia, will clarify the law further, and take notice of the ongoing constitutional debate described here.

II. Federalism and treaty enforcement in the European Union

The EU Treaties endow the EU with certain treaty-making powers, allowing the EU to become a party to international agreements (EU agreements). As in the United States, litigants increasingly base pleas on treaty provisions.³¹ This development raises the question of whether EU courts – the ECJ and the Member State courts in their role as ordinary EU courts³² – can and should apply EU agreements. As Advocate General Jääskinen has argued, the ECJ’s approach to this issue has been rather incoherent.³³ As pointed out by Mario Mendez in a study covering 377 EU agreements, in cases involving a conflict between an EU agreement and Member State law, the ECJ has typically been open to recognising the direct applicability of EU agreements.

²⁸ In the same sense, see also Garcia, Michael John, “International law and agreements: their effect upon US Law”, (2015), Congressional Research Service Report, 3–4.

²⁹ See e.g. Henkin, Louis, “U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker”, (1995) 89 AJIL 341–350, 346, arguing that such declarations are against the spirit of the Constitution.

³⁰ Vázquez, *supra* note 22 at 687–688.

³¹ In this sense, see Eckes, Christina, “International Law as Law of the EU: The Role of the ECJ”, in Cannizzaro Enzo, Palchetti Paolo & Wessel Ramses (eds), *International Law as Law of the European Union* (Boston: Martinus Nijhoff Publishers, 2012), 353–377.

³² Art. 19 TEU.

³³ Opinion of AG Jääskinen in Joined Cases C-401/12 P to C-403/12 P, *Vereniging Milieudefensie*, EU:C:2014:310, para. 8. Similarly, see De Baere, Geert and Ryngaert, Cedric, “The ECJ’s Judgment in *Air Transport Association of America* and the International Legal Context of the EU’s Climate Change Policy”, (2013) 18 EFA Rev 389–409, 395, referring to the ECJ’s approach as “essentially casuistic.”

By contrast, in cases involving a conflict between an EU agreement and secondary EU law, the ECJ has been more hesitant, deploying what Mendez has referred to as ‘judicial avoidance techniques.’³⁴

Similar to the US Supreme Court, in most cases the ECJ appears to approach the issue of direct applicability as a question of treaty interpretation.³⁵ For an answer to the question of the effects of treaty obligations within the EU legal order – be it in case of a conflict with Member State or with EU law – unless the treaty framers expressly take a position on which institutions are to execute the agreement, the Court typically turns to the text, context and purpose of the EU agreement at issue in an effort to identify the intent of the treaty makers.³⁶ For a provision of an EU agreement to be considered directly applicable within the EU, it must pass a two-step test. In *Slovak Brown Bears*, a case involving a conflict between an EU agreement and Member State law, the ECJ held that

*a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure...*³⁷

Similarly, in *Vereniging Milieudefensie*, a case involving an alleged conflict between an EU agreement and a norm of secondary EU law, the ECJ held that

*provisions of an international agreement to which the European Union is a party can be relied on in support of an action for annulment of an act of secondary EU legislation or an exception based on the illegality of such an act only where, first, the nature and the broad logic of that agreement do not preclude it and, secondly, those provisions appear, as regards their content, to be unconditional and sufficiently precise.*³⁸

Under both formulations, which can be considered functionally equivalent to one another, the test aims to determine the intent of the treaty framers.³⁹

Given the similarities in approach between the European and American high courts, it should not come as a surprise that they suffer from a similar weakness, i.e. the difficulty – and often the impossibility – of identifying the treaty-makers’ intent. As mentioned, Justice Breyer castigated the majority in *Medellin* for

³⁴ See generally Mendez, *supra* note 4. Note that the ECJ’s refusal to recognise the direct applicability of the GATT and WTO agreements in the EU legal order is a notable exception to this attitude of openness.

³⁵ The exception being the *Portugal v Council* case, where the ECJ engaged in an analysis reminiscent of the multi-factor approach proposed in the US by Justice Breyer. See Case C-149/96, *Portugal v Council*, EU:C:1999:574.

³⁶ See e.g. Joined Cases C-401/12 P to C-403/12 P, *Council v Vereniging Milieudefensie ea* (*‘Vereniging Milieudefensie’*), EU:C:2015:4, para. 53.

³⁷ Case C-240/09, *Lesoochránárske zoskupenie* (*‘Slovak Brown Bears’*), EU:C:2011:125, para. 44.

³⁸ *Vereniging Milieudefensie*, para. 44.

³⁹ The reference to the purpose of the agreement in *Slovak Brown Bears* and the reference to ‘the nature and broad logic’ of the agreement in *Vereniging Milieudefensie* tell us that much.

hunting the snark. A brief exploration of recent ECJ case law on the enforcement of treaty provisions against conflicting secondary EU law demonstrates how Justice Breyer's criticism applies to the ECJ as much as it did to the majority in *Medellin*. For, by approaching the question of the direct applicability of treaty provisions exclusively as a matter of treaty interpretation, the ECJ bends itself backwards to demonstrate that the text and context of EU agreements rules out judicial enforcement of treaty obligations.

Intertanko is a first case in which the artificiality of the ECJ's approach becomes visible.⁴⁰ At issue in *Intertanko* was whether a number of associations of shipping companies could challenge the validity of parts of a directive on ship-source pollution and on the introduction of penalties for infringements in light of provisions of the United Nations Convention on the Law of the Sea ('UNCLOS'). The Grand Chamber rejected this possibility since UNCLOS only established rights for states, and not for individuals.⁴¹ It followed, the ECJ held, that 'the nature and the broad logic' of UNCLOS prevent the Court from being able to assess the validity of a Community measure in the light of UNCLOS.⁴² That another reasonable outcome was available, had already been made clear by Advocate General Kokott, who in her opinion had considered that '[t]he degree to which individuals can rely on it can ... be determined solely on the basis of each respective relevant provision', and who consequently had advised the Court to deploy UNCLOS as a yardstick for judicial review of secondary EU law.⁴³

More recent cases are not any more persuasive on the issue of the direct applicability of treaty provisions. In the abovementioned *Vereniging Milieudefensie* case, litigants relied on Article 9(3) of the Aarhus Convention to contest the validity of a number of Commission decisions. The concerned provision holds that 'each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.' The ECJ considered this provision not directly applicable '[s]ince only members of the public who "meet the criteria, if any, laid down in ... national law" are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.'⁴⁴

Arguably, and as suggested by AG Jääskinen, it would have been equally persuasive to read Article 9(3) differently, as a directly applicable provision allowing the ECJ to assess whether the EU legislator has indeed put in place a review mechanism allowing members of the public to challenge acts and omissions which

⁴⁰ Case C-308/06, *Intertanko*, EU:C:2008:312.

⁴¹ Ibid, paras 59-61.

⁴² Ibid, para. 65.

⁴³ Opinion of AG Kokott in *Intertanko*, EU:C:2007:689, para. 59.

⁴⁴ *Vereniging Milieudefensie*, para. 55.

contravene provisions of its national environmental law. The Commission had denied review of a decision accepting a request by the Netherlands to extend the timeframe for complying with certain air quality requirements established by an EU directive. It justified this denial on the basis that the EU regulation implementing Article 9(3) of the Aarhus Convention only allowed for review of administrative acts of an individual scope. The decision at issue, the Commission contended, was of a general application, and could thus not be the objective of administrative review on the basis of the implementing regulation.

In *Vereniging Milieudefensie*, the ECJ thus had to determine whether Article 9(3) of the Aarhus Convention could be relied upon as a yardstick for judicial review of the part of the implementing regulation that restricted the possibility of administrative review to acts of an individual scope. It would not have been unreasonable to read the Aarhus provision as requiring the parties to the agreement to provide for a possibility of review of all acts, both individual and administrative. The text of the provision does not make a distinction between acts of an individual and general scope. The purpose of the agreement, however, can be understood as requiring both types of acts to be open to review.⁴⁵ The reference to ‘criteria ... laid down in national law’ could be understood, then, as criteria related to the modalities of the review procedure, e.g. the timeframe within which a challenge can be brought, the body responsible for reviewing the measures, and so forth. Not to be considered a modality, however, would be those elements required to fulfil the purpose of the agreement, such as the need to provide for a review procedure of administrative acts of both an individual and a general scope.

A similar point can be made with regard to the case of *Z*.⁴⁶ In this case, the ECJ was called upon to determine whether an anti-discrimination rule contained in the United Nations Convention on the Rights of Persons with Disabilities (‘UNCRPD’) could be relied upon as a standard for judicial review of two EU directives. The anti-discrimination provision provided that ‘State Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.’ The ECJ rejected the direct applicability of this and other provisions. It did so not on the basis of an analysis of the text of the provision, but, rather, on the basis of its context. In particular, it relied on Article 4(1) of the convention to conclude that the entire convention is ‘programmatic’ in nature and that, therefore, the ‘nature and purpose’ of the UNCRPD precludes its direct applicability, as the convention itself calls for further legislative implementation.⁴⁷

⁴⁵ Art. 31 VCLT calls for an interpretation of a treaty ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

⁴⁶ Case C-363/13, *Z v A Government department ea* (“Z”), EU:C:2014:159.

⁴⁷ Art. 4(1) UNCRPD provides that ‘States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.’

Here again, another reasonable interpretation was available. A focus on the text of the concerned treaty provision could without great difficulty have supported an argument in favour of direct applicability, if only because it is in the nature of fundamental rights provisions to be formulated broadly, and that it is not unprecedented for the ECJ to recognise the direct applicability of provisions aimed at State parties.⁴⁸ What is striking in *Z*, therefore, is the ECJ's willingness to cast aside the text of the treaty provision involved, and turn to the broader context of the agreement in search of elements pointing in the other direction, i.e. against direct applicability. Had the ECJ focussed as much on the text of the treaty provision(s) at issue as it had done previously in *Vereniging Milieudefensie*, a conclusion in favour of direct applicability arguably would have been drawn.

What cases such as *Intertanko*, *Vereniging Milieudefensie* and *Z* demonstrate, is the difficulty that comes with focussing primarily on the text of treaties in search for an answer to the essentially constitutional question of whether courts can enforce treaty provisions directly or whether this task comes to the legislature. As Justice Breyer argued convincingly, it is fair to say that multilateral agreements – such as UNCLOS, the Aarhus Convention or the UNCRPD – do not contain any original intent on the issue of which institutions or departments within the many state-parties should be responsible for the agreement's enforcement. Had an agreement amongst all state-parties on this issue been required, presumably no agreement would have been reached at all.

Once the artificial nature of the search for an original intent becomes apparent, something else is needed to allow courts to perform the direct applicability analysis. In search for such a missing element, it is again appropriate to look across the Atlantic, to the United States.

III. Two Letters from America

This final section presents two suggestions – two Letters from America – the joint implementation of which would both increase the persuasiveness of the ECJ's reasoning and facilitate the court's analysis. A first Letter touches on the normative underpinnings of the ECJ's approach to treaty enforcement; a second Letter operates at the legal doctrinal level, and aims to answer the question of what a court is to do when it is unable to discern any original intent on the question of who is to enforce a treaty obligation.

⁴⁸ See in particular Case C-43/75, *Defrenne*, EU:C:1976:56.

A. Letter one: emphasise the constitutional nature of treaty enforcement

Domestic law is ‘here’, while international law is ‘there’, Canadian legal scholar Karen Knop once argued.⁴⁹ This is true also with regards to the EU, which through a process of constitutionalisation and emancipation of international law has created its own domestic legal order.⁵⁰ It follows that the ECJ must articulate a persuasive answer to the essentially constitutional question of what status international law ought to be given within the polity’s domestic legal order.

Articulating a persuasive answer requires, first and foremost, putting emphasis on the constitutional nature of the issue. As discussed in the above, it is not helpful to present the treaty enforcement issue as one that starts and ends with an interpretation of the concerned treaty, as the Supreme Court did in *Medellin*, and as the ECJ continues to do in cases such as *Intertanko*, *Vereniging Milieudefensie* and *Z*. A more helpful approach would start from constitutional principle and, from there, take stock of all relevant factors, including the treaty text, but also competing constitutional principles. Arguably, this has been the approach of Chief Justice Marshall in the much older US Supreme Court case of *Foster v Neilson*, where Marshall started his inquiry by emphasising how the Supremacy Clause represented a rupture with the British tradition, which requires treaties to be implemented by means of legislative action before they can be relied upon before the courts.⁵¹ This approach, grounded in constitutional principle, should be the approach of a constitutional court such as the ECJ as well.

In the European context, a constitution-focussed approach to treaty enforcement requires EU courts to perform a balancing exercise between competing constitutional principles. While the precise configuration of the balancing act cannot be determined in the abstract, at least two such principles can be expected to play a role in the ECJ’s direct applicability analysis. A first principle to play a role in the direct applicability analysis is the principle that ‘in its relations with the wider world, the EU shall ... contribute ... to the strict observance of international law...’⁵² The strict-observance-of-international-law principle incorporates the international legal principle of *pacta sunt servanda* into the EU’s constitutional order. It can be understood as requiring the ECJ to enforce treaty in as effective a manner as possible.

The second, competing principle is that of the autonomy of EU law, in particular in its external dimension.⁵³ The autonomy of EU law is a *Leitmotiv* in the case law of the ECJ.⁵⁴ Initially, the principle served to

⁴⁹ Knop, Karen, “Here and There: International Law in Domestic Courts”, (1999) 32 NYU J IL & P, 501.

⁵⁰ See note 1.

⁵¹ 27 US 253 (1829).

⁵² Art. 3(5) TEU.

⁵³ See Odermatt, Jed, “When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law” (2016) EUI Working Papers, 1, distinguishing between internal and external autonomy.

⁵⁴ See seminally *Van Gend & Loos*, p 12.

consolidate the legal and institutional autonomy of the EU *vis-à-vis* the Member States. It aimed to protect, primarily, the process of cooperation between the ECJ and the Member State courts, which, on the basis of Article 267 TFEU always have the possibility, and, in some instances the obligation, to refer questions of EU law to the ECJ.⁵⁵ In its opinion on the compatibility of the draft accession agreement of the EU to the European Convention on Human Rights, the ECJ expressly extended the reach of the autonomy principle to the EU-international law nexus in an effort, again, to protect the position of the ECJ as the judicial body with the ultimate and exclusive authority to interpret EU law, on this occasion against possible competition by the Strasbourg court.⁵⁶

However, the autonomy principle serves not only the autonomy of the ECJ, but, also, that of the other EU institutions, including the political institutions (Commission, Council and Parliament).⁵⁷ As such, to emphasise that EU law is an autonomous legal and institutional order serves to ensure that the EU's political institutions have the ability to engage independently in processes of democratic will formation at the EU level of governance, as is required by Article 10(1) TEU, which provides that the functioning of the Union shall be founded on representative democracy.⁵⁸ In this respect, to emphasise the autonomy of EU law is not fundamentally different from emphasising the sovereignty of the US Congress to adopt a statute that conflicts with an earlier treaty commitment.⁵⁹ To deny Congress this possibility, would be to undermine the sovereignty of the American people.⁶⁰ In the same sense, to emphasise the autonomy of EU law is to emphasise the authority of the EU institutions, as representatives of the EU citizenry, to adopt laws, including EU agreements, in an effort to give expression to the preferences of the EU citizens, as expressed at the ballot box both at EU level (represented in Parliament) and at the national level (represented in the Council).⁶¹

At the level of constitutional principle, therefore, the question of treaty enforcement in the compound EU polity translates, at the very least, as one of a balancing exercise between the constitutional principles of

⁵⁵ On this process of cooperation, see seminally alter, Karen J, *Establishing the Supremacy of European Law: the Making of an International Rule of Law in Europe* (Oxford, Oxford University Press, 2001).

⁵⁶ On the role of the autonomy principle in Opinion 2/13, see also Halberstam, Daniel, "It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward", (2015) 16 GLJ 105.

⁵⁷ The ECJ has historically understood the European integration project as an institutional project, entailing the establishment of a set of autonomous institutions. On this topic, see Azoulai, Loïc, "The Many Visions of Europe. Insights from the Reasoning of the European Court of Justice in External Relations Law", in Cremona Marise & Thies Anne (eds), *The European Court of Justice and External Relations: Constitutional Challenges* (Oxford, Hart Publishing, 2014) 165–182, 173–174.

⁵⁸ See also Eckes, Christina, "International Rulings and the EU Legal Order: Autonomy as Legitimacy?" (2016) CLEER Working Papers, 8–13, http://www.asser.nl/media/3002/cleer16-2_complete_web.pdf (online on 19 September 2016), emphasising the link between democratic legitimacy and autonomy.

⁵⁹ A rule referred to as the later- or last-in-time rule. On this rule, see Bradley, *supra* note 26 at 52–55.

⁶⁰ See e.g. *Chae Chan Ping v. US* ('Chinese Exclusion Case') 130 US 581, 9 S.Ct. 623, where the Supreme Court justified reliance on the later-in-time rule on grounds of popular sovereignty.

⁶¹ Note that the autonomy of the EU institutional order indirectly protects also the autonomy of the Member States, as represented in the Council.

ensuring a strict observance of international law on the one hand, and protecting the autonomy of the EU legal and institutional order, on the other.⁶²

B. Letter two: recognise a presumption in favour of direct applicability

Balancing competing principles entails a risk of legal uncertainty.⁶³ Presumptions or default rules are appropriate means to mitigate this risk, as they nudge courts into a certain direction when balancing competing principles. Drawing on the American debate on the issue of treaty enforcement discussed in the above, and in particular on Vázquez's argument in defence of a default rule of self-execution, a second Letter from America suggests as a prescriptive matter that in the EU setting a similar presumption in favour of direct applicability is required.

Despite the lack of transparency in the ECJ's reasoning, it is fair to say that, at least in cases involving an alleged conflict between EU agreements secondary EU law, the ECJ does not perform its direct applicability analysis on the basis of such a presumption. As discussed, in cases such as *Intertanko*, *Z* and *Vereniging Milieudefensie*, the Court could have come down on the other side of the argument. The fact that it did not can be understood as an indication that the ECJ understands the primacy of EU agreements only as a principle guiding the interpretation of secondary EU law, rather than as a principle liable to affect its validity.⁶⁴ To endorse this view, however, would be a mistake. As a polity which itself is a product of international law, one which, moreover, has constitutionally entrenched the need to respect international law, it would be appropriate to let the direct applicability analysis be guided the opposite presumption, i.e. one in favour of direct applicability, if only because it can be assumed that judicial enforcement increases the likelihood that the EU will respect its international obligations.

The presumption should be rebuttable, however, making it possible for parties to mount arguments against direct applicability, and allowing the ECJ to protect constitutional principles – including the autonomy of EU law and of the Member States – if need may be. Different types of rebuttal can be imagined, each grounded in different constitutional principles. One can imagine, for example, a clear statement in the text of the

⁶² The strict-observance-of-international-law and autonomy principles are not the only principles susceptible of playing a role in the direct applicability analysis. If, for example, the EU legislator purports to attain an objective it would not have been able to attain through the use of a domestic legislative act – e.g. the harmonisation of a policy area when the Treaties expressly rule out such harmonisation – the protection of the autonomy of the Member States, expressed in Art. 4(2) TEU, could be included as a factor in the Court's balancing exercise. In the event no party challenges the constitutionality of the Council decision concluding the EU agreement, this strategy would provide the Court with an alternative means, to be invoked *ex officio*, to protect the balance between unity and diversity within the EU polity.

⁶³ Some have gone as far as to suggest that balancing is an essentially political act. See e.g. Van Malleghem, Pieter-Augustijn, *Proportionality and the Erosion of Formalism* (2015) PhD Dissertation, University of Leuven.

⁶⁴ *Z* is a case in point: while the ECJ did reject the direct applicability of the agreement at issue, it did interpret secondary EU law in harmony with the agreement.

agreement that expresses an unambiguous intent of the treaty framers to make the judicial enforcement of a treaty dependent on the adoption of implementing legislation. To rule against direct applicability in such a hypothesis would be in keeping with the strict-observance-of-international-law principle. Alternatively, a treaty provision could be considered a violation of the autonomy of the Member States⁶⁵, e.g. when it purports to harmonise an area of law which cannot be harmonised through the adoption of domestic EU legislation. No exhaustive list of ways on the basis which the presumption can be rebutted is required. What matters, is that the parties and subsequently the Court explain in a persuasive manner why a given treaty provision should *not* be considered directly applicable.

A presumption of this kind strikes an appropriate balance between openness towards international law and an insistence on protecting the integrity of the EU constitution. It gives expression to the EU's commitment to a rule-based international order, while at the same time preserving the authority of the EU citizenry – as represented individually in the Parliament and collectively in the Council – to deny courts the possibility of enforcing international treaty obligations directly and, even, to adopt later legislation that conflicts with earlier treaty commitments. In practical terms, moreover, a presumption in favour of direct applicability would not entail much change in institutional practice. Increasingly often, the Council includes in its decision authorising the signing of EU agreements a provision akin to what in the US context is referred to as a declaration of non-self-execution.⁶⁶ The presence of such a provision could be understood as a sufficient argument to rebut the presumption proposed here, provided they are communicated to all parties to the agreement.

Conclusion

This paper looked across the Atlantic in an effort to remedy what commentators have referred to as the 'casuistic', 'incoherent' and 'formalistic' approach of the ECJ to the issue of treaty enforcement within the compound EU polity. Drawing on recent American debates, it put forward a two-fold suggestion. First, it argued in favour of a more explicit engagement with the constitutional principles underpinning the issue of treaty enforcement within the EU. Second, it argued for the recognition of a default rule in favour of direct applicability. Embracing both of these suggestions – both of these Letters from America – would render more transparent the ECJ's approach to treaty enforcement. It would lead the ECJ to explain the reasoning underlying its approach and, of crucial importance, it would render more predictable the treaty enforcement analysis. Increased predictability benefits legal certainty and thus the rule of law. At the same time, by

⁶⁵ Art. 4(2) TEU.

⁶⁶ See e.g. Art. 4, Council Decision (EU) 2016/1623 of 1 June 2016 on the signing, on behalf of the European Union and provisional application of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, *OJ L* 250, 16.9.2016, 1–2. On the use of such declarations in trade agreements, see Semertzi, Alik, "The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements", (2014) 51 CMLRev 1125–1158.

recognising the possibility for the EU legislature – and providing it with a constitutional justification – the autonomy of the EU as a level of governance operating on democratic terms as well as the autonomy of the Member States as member units of the compound federal-type EU polity would be strengthened.